

**MINUTES**

**MONTANA SENATE  
56th LEGISLATURE - REGULAR SESSION**

**COMMITTEE ON NATURAL RESOURCES**

**Call to Order:** By **CHAIRMAN WILLIAM CRISMORE**, on January 25, 1999  
at 3:00 P.M., in Room 405 Capitol.

**ROLL CALL**

**Members Present:**

Sen. William Crismore, Chairman (R)  
Sen. Dale Mahlum, Vice Chairman (R)  
Sen. Vicki Cocchiarella (D)  
Sen. Mack Cole (R)  
Sen. Lorents Grosfield (R)  
Sen. Tom Keating (R)  
Sen. Bea McCarthy (D)  
Sen. Ken Miller (R)  
Sen. Glenn Roush (D)  
Sen. Mike Taylor (R)  
Sen. Bill Wilson (D)

**Members Excused:** None.

**Members Absent:** None.

**Staff Present:** Larry Mitchell, Legislative Branch  
Jyl Scheel, Committee Secretary

**Please Note:** These are summary minutes. Testimony and  
discussion are paraphrased and condensed.

**Committee Business Summary:**

Hearing(s) & Date(s) Posted: SB 235, 1/25/1999  
Executive Action: SB 40

**HEARING ON SB 235**

**Sponsor:** SENATOR JACK WELLS, SD 14, BOZEMAN

**Proponents:**

**Arvid Hiller, Vice President and General Manager, Mountain Water Co., Missoula**

**Carl Stetzner, Chief Executive Officer, Anaconda-Deer Lodge Co.**

**Mike Grayson, County Attorney, Anaconda-Deer Lodge County**

**Carl Schweitzer, Bozeman Chamber of Commerce**

**REPRESENTATIVE CINDY YOUNKIN, HD 28, BOZEMAN**

**SENATOR BEA MCCARTHY, SD 29, ANACONDA**

**Opponents: None.**

**Opening Statement by Sponsor:**

**SENATOR JACK WELLS, SD 14, BOZEMAN,** spoke in support of SB 235 which addresses important municipal water rights and amends sections of Title 85 that govern these water rights. It recognizes certain activities by municipal organizations that would suffice to guarantee their water rights in future years. There is some concern that non-use of their water rights over a period of time might be presumed to mean they are abandoning these rights and that is what they want to prevent. He pointed out that this bill does not create a municipal preference as found in other states. It does establish a set of criteria which could be used as evidence to apply to questions of abandonment of the municipal water rights. The bill is limited in that it does apply to A-closed waters and those categories of A-closed are the highest classification of water in the state. There are about 15 sources of water and these are all in the western part of Montana. **EXHIBIT(nas19a01)** & **EXHIBIT(nas19a02)**. The bill does not exempt water rights in these basins from a challenge if someone thinks there is abandonment but it simply establishes a set of criteria the court could consider if someone does suggest that the water rights had been abandoned. The major concern is long-term protection. If the municipalities do engage in certain specific activities that are listed in the bill then there is a presumption against abandonment.

**{Tape : 1; Side : A; Approx. Time Counter : 0 - 4.2; Comments : None.}**

**Proponents' Testimony:**

**Arvid Hiller, Vice President and General Manager, Mountain Water Company, Missoula** spoke in support of SB 235 as per attached tesitmony. **EXHIBIT(nas19a03)**.

**Carl Stetzner, Chief Executive Officer of Anaconda-Deer Lodge County**, spoke in support of SB 235 as per attached testimony. **EXHIBIT (nas19a04)**.

**Mike Grayson, County Attorney for Anaconda-Deer Lodge County** spoke in support of SB 235. Anaconda-Deer Lodge is a consolidated city-county government. Their problem, at this point in time, is the Hearst Lake-Fifer drainage has not been used for municipal purposes for about twenty years (1979). To bring the Hearst Lake-Fifer system into the domestic water system will cost about \$1,000,000. Anaconda is a small municipality with about 7000-8000 water users in the system and will require a vote under CI-75 for a rate increase. They do not want to go to the voters and ask for an increase and meanwhile find out the water right has been abandoned.

According to several Supreme Court decisions, there is essentially a presumption of abandonment that occurs after that much non-use. The money they have spent in planning, design, and feasibility studies to bring Hearst Lake-Fifer back into the system would be used as arguments in court to show why they think they have not abandoned their water right. With the current statute there is not really any statutory guidance, however, for the court to determine their water rights are not abandoned. The Hearst Lake-Fifer water rights were purchased from Butte Water Co. in 1992. They are over 100 year old water rights and they do not want to lose them. They feel this legislation would prevent them from ever being deemed abandoned by a court and ask for the committee's support of this bill.

**Carl Schweitzer, Bozeman Chamber of Commerce**, spoke in support of SB 235. Lyman-Sourdough Creek in Bozeman is affected by this legislation and they feel it is important that this water right be maintained as a source for municipal consumption.

**REPRESENTATIVE CINDY YOUNKIN, HD 28, BOZEMAN**, spoke in support of SB 235. She is an attorney representing the City of Bozeman as well as a Representative from HD 28 in Bozeman.

The City of Bozeman has two sources of water that are on A-Closed streams - Lyman Creek and Sourdough Creek. A significant portion of Bozeman's water comes from Hylite Creek a/k/a Middle Creek. A-Closed streams are the highest quality water available in Montana and consequently do not require as much treatment before the water can be used for public water supply.

The Mystic Lake water right on Sourdough Creek is the most commonly known Bozeman water right affected by this bill. In order to protect the right, the city has undertaken significant

steps to demonstrate there is no intention to abandon that water right. They have conducted engineering studies and feasibility studies to find alternate locations in Sourdough Canyon to rebuild that reservoir at some point in the future when the city's needs for the additional water arise. Bozeman is one of the faster growing communities in Montana and the need to use water out of this right is a certainty which they estimate at about twenty years.

Basic water law in Montana is on the doctrine of prior appropriation and the primary tenant of that is, quite simply, use it or lose it. Our Supreme Court says mere non-use is not sufficient to abandon a water right but non-use with an intention to abandon renders an unused right - abandoned. The court also says long periods of non-use raise a rebuttable presumption of abandonment.

**SB 235** will place municipal rights on A-Closed streams only. No other sources of water will be affected by this. It will place those in a situation of being presumed not to be abandoned. This will save potentially \$1,000's of dollars in litigation expenses should someone or some entity challenge certain municipal water rights which are in a period of non-use right now.

**SB 235** will also partially codify what is known as the great and growing cities doctrine which has been espoused by the Supreme Court of other states. It originally came out of Colorado's Supreme Court and had to do with the City of Denver. This bill will not in any way give municipalities a carte blanche permit to quit using some of their water rights or to ignore any unused water rights. In order for a right to be protected under this bill, there is a list of things that a municipality must do in order for their right to be presumed not abandoned. **SB 235** will change the evidentiary standard. It changes the burden of proof that one has in order to find that a water right has been abandoned. It also changes what one has to do in order to protect it. This bill helps us to plan for the future. She urged the committee to take this small but important step in protecting a critical portion of Montana water rights and respectfully requested DO PASS on this bill.

**SENATOR BEA MCCARTHY, SD 29, ANACONDA,** went on record in support of SB 235.

**Opponent Testimony:** None

**Informational Testimony:**

**Mike Murphy, Montana Water Resources Association**, stated while this particular issue does deal with some important needs associated with municipalities, the fact the bill is very specifically and narrowly defined regarding A-Closed waters probably does not have a significant impact, at this point in time, regarding the overall issue of water rights abandonment. He stated they do want to register concern regarding the precedents this may set regarding municipalities and their interests similar or preferential treatment down the road. They also want to go on record in commenting, that given the statutes that are in place at this time, it would most likely be the interpretation of the Water Court that they would look at these evidentiary issues when taking into consideration the abandonment issue. Down the road this could open the flood gates.

**{Tape : 1; Side : A; Approx. Time Counter : 4.2 - 28.4; Comments : None.}**

**Questions from Committee Members and Responses:**

**SENATOR GROSFIELD** stated on Line 24 it says water right. Is a permit a water right or would it be interpreted to be a water right under this language and the same question in regard to a water reservation? **Jack Stults, Division Administrator for Water Resources, DNRC**, stated yes, under the definitions of the Water Use Act, of which this is a part, both a permit and a reserved water right would be considered an appropriation.

**SENATOR GROSFIELD** stated this bill goes through a list of A-G and would presume all the proponents testifying today qualify under all of those. Is the bill drafted with that in mind? **Mike Grayson** responded he was not sure each of the three municipalities testifying today would meet each one of these for various reasons.

**SENATOR GROSFIELD** stated he was struggling with the implications of (a). If a municipality applied for a water right or claimed a water right in 1880 or 1950 for 250 cubic feet per second (cfs), and under the adjudication process registered a claim for that, however, they are using only 5 cubic feet per second (cfs). Under this bill they have used part of their water supply, would this guarantee they would never lose the other 245 cfs? **Jack Stults** responded this was his understanding. If at any time in history, any part of the water right has been used, it means they could never lose any of the right. **SEN. GROSFIELD** also stated there was nothing stated in the bill regarding potential sale. Theoretically, if they never could lose it, then at any time in the future they could sell a part of it to another user assuming they went through the change process. **Jack Stults** responded that

was correct, it may lose its character if sold to another use but his reading of this currently is that it would retain that character until after the change process.

**SENATOR GROSFIELD** questioned if the Water Court would deal with a basin that is not yet adjudicated and maybe has not been issued a temporary preliminary decree yet. If there were a claim that most people would agree was not quite into play yet, how is a water court going to deal with that claim if we pass this bill in its current form? **REPRESENTATIVE YOUNKIN** said the arguments she would make to the court, under this scenario, would be in order for protection under the statute. The municipality would have had to do any one or more of items a - g. That being the case, her argument would then be that the legislature's intent was to protect the ability of the city to be able to use that right: 1) because it is on an A-Closed stream and clean water is getting harder and harder to come by, 2) the great and growing cities doctrine. That is what this statute would do, give cities the assurance they will have that water right in the future when they need it if they have done certain things to get it and were on a very high quality water source. **SEN. GROSFIELD** stated he was a little troubled by the broadness of the bill. We are almost creating something equivalent to a federal reserved water right in the sense of for an Indian Tribe. He was not sure that it made sense to tie our hands for that many years. **REP. YOUNKIN** said the water rights we know about, affected by this, are from 2 to 5 cfs. There very well could be some that might be affected that are in a period of non-use.

**SENATOR KEATING** questioned if the right could not be transferred by the city at sometime? **REP. YOUNKIN** replied it could. In order for any city to sell their municipal water right to anybody else, they have to go through a change application. That change in purpose is a pretty uncommon change and there is a fairly high standard applied to that. You would have to show that nobody will be adversely affected by the change, which is a very difficult thing to do.

*{Tape : 1; Side : A; Approx. Time Counter : 28.4 - 43.5; Comments : Turned over to Side B at this point.}*

**SENATOR TAYLOR** questioned what about the private users that have irrigating rights who may not have used them for ten years. They are old rights from the late 1800's or early 1900's, how does this legislation connect? **Mike Murphy**, this bill does not apply to rights outside of municipalities. Our concern is very similar to what you have stated. There are other rights, in similar condition, that for whatever reasons have not been used. Some things may have been done to protect those interests but

they are still subject to a challenge associated with the potential issue of abandonment. The same issues really apply across the board to water rights, so this does treat one segment differently with a preference in regard to the abandonment issue. That is why I raised the concern that this could open up the flood gates, in a sense, particularly with municipalities and the implications of the impacts that could be felt if this gets outside of this specific and narrow defined area. **SEN. TAYLOR** questioned if this affected the adjudication rights at all? What if someone were given an abandoned right? **Jack Stults** responded there are twelve municipalities affected that would be protected by this on the fifteen different drainages. None of the sources of water are in a final decree so there is still opportunity for some determination to be made by the court as to whether there is an abandonment issue. None of them are finally settled by the current statewide adjudication.

**SENATOR MAHLUM** gave an example of a city having an old water right they have not used which is class A-Closed. Also on the stream are several farms and ranches which have used water out of the stream. Could the city say we always water out of that stream? **Jack Stults** said if the city has an old right and actually senior to the ranchers and farmers, under this law, and actually if it were found to be a valid right through the adjudication, yes they could come and expand the use of it and at the peril of the junior water rights.

**SENATOR MCCARTHY** asked Mr. Grayson if there was anything he would like to add? **Mr. Grayson** stated what makes municipal water rights different, and deserving of being a little different, is when there is a closed water shed. To a certain degree the Department has already looked, and said this area should be clean enough to be a good drinking water surface. For a municipality to put the kind of investments necessary into the improvements to bring this into municipal use, there needs to be some certainty that it will not be taken away in a court proceeding resulting in the junior users now becoming the senior users.

**SENATOR GROSFIELD** stated the unclassification system says that you cannot go down. The state cannot make a stream go down in classification. Is it likely that we will see any more A-Closed streams? **Jack Stults** stated he was not familiar enough with the classification system and the dynamics of it to be able to answer the question. **SEN. GROSFIELD** then questioned if the Department issued any permits on A-Closed waters for any non-drinking water purpose? **Jack Stults** responded he could not specifically say that they have but there is nothing that would prohibit them from doing that as long as the criteria was met.

**SENATOR GROSFIELD** stated, according to the testimony, it was his impression people were interested in protecting the water right claims they now have, in the adjudication process that is on-going. Would this bill not need a retroactive applicability date in order to give them any help? Otherwise it is just effective upon passage and approval and it would probably not affect any prior rights and proceedings without a retroactive applicability date. **Larry Mitchell** agreed that could be a concern. He would check with chief legal counsel.

**{Tape : 1; Side : B; Approx. Time Counter : 0 - 7.3; Comments : None.}**

**Closing by Sponsor:**

**SENATOR JACK WELLS** stated this bill is narrow in scope, a lot of criteria has been listed the municipalities would have to meet in order to try to protect these water rights. The questions raised are important and perhaps the effectivity of the bill may be addressed. In general, they tried to structure something that was best for the most in the sense of the numbers of people that would be affected in these municipalities across western Montana as the population grows and the need for additional water is required. Regarding the comment that it may open the door for other things, other water right challenges could be faced in future legislative efforts and would probably appear before this committee to handle those kind of things. In the sense of the A-closed watersheds, he thinks this bill would be a good step to protect the future for these communities and their aquifers and thanked the committee for the good hearing.

**{Tape : 1; Side : B; Approx. Time Counter : 7.3 - 8.8; Comments : None.}**

**EXECUTIVE ACTION ON SB 40**

**Motion/Vote:** **SEN. KEATING** moved that **SB 40 DO PASS**. Motion carried 9-0. No amendments were offered.



**ADJOURNMENT**

Adjournment: 4:00 P.M.

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SEN. WILLIAM CRISMORE, Chairman

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JYL SCHEEL, Secretary

WC/JS

**EXHIBIT (nas19aad)**